

CMA Digital Mergers Call for Information

(a) What market features are likely to be relevant to the assessment of mergers in digital markets? For example:

(i) The multi-sided nature of many digital markets (eg digital platform markets).

Multi-sidedness is neither a novel nor differentiating feature of digital markets – multi-sided models having been widely used prior to the development of digital markets, for example in the context of advertising-funded newspaper publishing or TV broadcasting. It is also important not to simply assume that digital markets are multi-sided or that those that are multi-sided deploy the same models. For example, some digital markets are purely advertising funded (such that consumers do not directly pay for services), as has long been the case in certain print media publishing and TV models (*e.g.*, Facebook and Google search). Others see consumers paying directly for services (with or without other payments), including services like food delivery and on-demand transport. There are significant differences between these models, including whether and how consumer data is collected and used (not only through monetisation). Conflating the broad range of potential “digital markets” into a single amorphous category could lead to adverse consequences for being both unjustified and inappropriate, while also possibly leading to inappropriate regulation.

Beyond this, multi-sided digital services inherently bring together groups of users and suppliers. In some cases they enable entirely new transactions (*e.g.*, Airbnb), in others they significantly expand the size of the groups brought together (*e.g.*, enabling transport providers other than taxis to offer services) and in others they expand the sizes of the groups by removing physical proximity as a factor (*e.g.*, eBay). In bringing groups of users and suppliers together in these ways, they generate significant efficiencies, ranging from improved choice in near-globally accessible retail markets to improved services like travel and ridesharing. Multi-sided intermediary services inherently bring together suppliers and acquirers of products or services (or both). Intermediaries enable better alignment of supply and demand, improving predictability for all sides of the market (amongst other things).

While many digital markets are multi-sided, such that this is indeed a relevant characteristic to take into account in assessing mergers, this does not make such markets unique. Competition agencies have considered mergers involving multi-sided markets for many years, and have developed and tested a number of theories of harm. As this existing practice makes clear, multi-sidedness in and of itself is not a theory of harm. Not only would there be no legal basis for treating digital markets differently because they are multi-sided, doing so would create significant uncertainty and reduce investment in innovative new digital markets. While competition risks may arise if dominant intermediaries adopt exclusionary practices, this does not render multi-sided markets inherently anticompetitive or require a fundamentally different antitrust analysis. It simply means that certain types of conduct by dominant entities warrants scrutiny, as is the case generally. Unless dominant companies engage in anticompetitive conduct, and as further set out in response to Question (a)(v), network effects and certain other efficiency-generating characteristics of multi-sided markets generate substantial efficiencies.

(ii) The way in which digital products or services are monetised (eg through advertising revenues).

While several cases to date have focussed on the monetisation of multi-sided platforms through advertisements, it would be inappropriate to assume that all digital products or

services are monetised in this way. Advertising-funding is merely one way of monetising digital products or services. There is a host of alternative models, and the types of models that can be used continues to grow. Examples include (i) subscription models, where customers pay a recurring subscription for the product or service (*e.g.*, Netflix, Apple Music, Kindle Unlimited, Dollar Shave Club); (ii) the Freemium model, where customers have free access to the basic service but are charged for additional features, capacity or else (*e.g.*, Spotify, LinkedIn, Dropbox, The Daily Telegraph); (iii) the marketplace model, where the intermediary facilitates economic interaction between third parties (*e.g.*, eBay, Alibaba, The Funding Circle, iTunes, App Store, Uber, Airbnb); (iv) the on-demand model, which generates revenue from users wanting to have things done right away (*e.g.*, Operator, TaskRabbit); (v) the ecosystem model, where companies build a universe of related and/or connected products and services to satisfy the customer needs (*e.g.*, Apple, Google). Further, the fact that certain services or products are offered within a wider ecosystem means that they may not be directly monetised at all (*e.g.*, Google maps incorporated into Google local, shopping and hotels services).

This diversity of models makes it clear that a detailed assessment of the individual characteristics of market(s) and product(s) is required. Key differences flowing from the monetisation models affect the competition assessment at various stages of any transaction review, from the relevance of transaction value-based merger thresholds (*i.e.*, jurisdiction) to the assessment of market power and anticompetitive effects.

(iii) The fact that users in certain digital markets pay for products or services through non-monetary means (eg provision of personal data).

Data (personal and otherwise) is used in a range of ways in digital markets. For example, advertising-funded models rely on the use of data to serve ads that are relevant to the user or the particular context. Such models directly monetise data. In other contexts, data is either monetised less directly or is not monetised at all. For example, it might be used to recommend other products or services that the consumer might find interesting, to create relevant special offers for the consumer, to make recommendations to assist users to expand their networks, to improve the service itself (including by improving and training algorithms) or in a variety of other ways. All of these uses are efficiency-enhancing - they enable the supply of higher quality, more useful and relevant services.

As this makes clear, data is used in a range of ways (many of which do not entail direct monetisation) in different models. As a result, the competitive relevance of data as an input needs to be analysed on a case-by-case basis. The amount of data required, the extent to which other data sets can be obtained, and the fungibility of data for the particular use will all impact on the competitive relevance.

Further, in a market where there is no direct payment by consumers, competition on quality parameters becomes more important. As a result, where such models are deployed, the quality of services improves as a result of quality-based competition, creating consumer benefits. In this context, the fact that customers multi-home extensively in certain digital markets and face low switching costs in many such markets should they choose to switch altogether, enhances the importance of quality-based competition for providers wishing to retain consumers (and the data that they generate through using the service).

(iv) The relevance of data assets for competition.

Data (personal and otherwise) remains, foremost, an input. Users (whether consumers or professionals) can provide data directly (*e.g.*, inputting data into a profile) or a service provider may gather data based on observed behaviour. Such data enables the development of novel and efficient business models. Users are attracted by, and benefit from, the improved relevance and/or quality of a service that results from the use of data. Merchants and advertisers use the data to deliver targeted advertising and offers, and to improve algorithms and AI. The better (more voluminous, relevant, accurate, timely etc.) the data, the more relevant the advertising and offers, and better the algorithm.

Merely collecting and amassing data is not exclusionary. At a fundamental level, data is easy and relatively low cost to collect and/or acquire, and the fact that one entity collects certain data does not preclude others (potential many others) from also collecting data. It is also important to take into account the fact that data can rapidly become “stale”, depending on the use being made of it. Different uses may require larger or smaller data sets, and may or may not need to be “refreshed” at differing intervals.

Whether in the context of multi-sided platforms, the development of algorithms or other functions/models that benefit from data, there are key competition questions that need to be answered before any conclusions can be drawn regarding disadvantaging competitors, let alone exclusion, including: What other data is available to competitors? Is that data fungible or equivalent (and does it need to be)? How many other sources of data are there (and are they publicly available)? What is the relative quality of relevant data and the third-party data? If data were used in machine learning, would that be enough or is other data required? What incentives does the acquirer have to restrict access to data? It is important to determine whether the data is unique and unreplicable, whether it is fungible, and whether access to a specific set of data is necessary.

As this framework makes clear, in many contexts data does not display characteristics that warrant departure from the application of competition rules to other inputs.

(v) The importance of network effects.

Network effects are not inherently anti-competitive and, indeed, can generate substantial efficiencies benefiting to users, including by aligning supply and demand. Cross network efficiencies occur when the utility of the intermediated service on each side of the market increases with the number of users on another side of the market. The pro-competitive effects of (indirect) network effects are important for start-ups, since they can drive growth on more than one side of the market more quickly than would be the case with direct network effects.

Further, while scale is important, many markets characterised by network effects can and do sustain a variety of players, where participants on one or more sides of such markets multi-home. With low or no barriers to multi-homing and low switching costs, consumers generally have the ability to search for the service or services that optimally suit their needs, meaning that competition takes place on quality parameters.

Network effects can facilitate anti-competitive conduct, even in digital markets. Where users do not multi-home and there is a single large network, it is possible that the relevant market may “tip”. However, there are a number of potential remedies that can be used to facilitate entry and growth by competing networks so enable them to reach the scale to be able to compete, including access and interoperability remedies.

(b) How might these market features impact the possible theories of harm? For example:

(i) Loss of actual or perceived potential competition – eg where the target is still relatively young but has growth potential, has promising pipeline products that have not yet come to market, or is currently only active in a complementary market.

The topic of early, or so called “killer” acquisitions has been the subject of much debate, notwithstanding the fact that there are few if any instances of such transactions.

Despite this, the fear of under-enforcement in digital markets has driven proposals for changes to merger review. Several recent studies discuss potential changes to merger review to preempt this perceived issue. The Lear Report recommends enabling competition authorities to be more speculative in their assessment of counterfactuals, including with regard to the potential evolution of the business models of market players and how successful they will be.¹ Similarly, the Furman Report recommends a balance of harms approach, which would enable the CMA to review and potentially prohibit mergers on the basis of a cost-benefit calculation of (i) the probability and (ii) the magnitude of potential anticompetitive effects.² This proposal aims to expand the scope of the balance of probabilities test, such that mergers could be prohibited where their anticompetitive effects are of low probability but high magnitude.

There would be significant risks to applying a forward looking, speculative assessment. Merger review on the basis of a speculative error-cost framework will be inaccurate and may be faulty as a result of the number and complexity of the variables that it has to calculate. As noted in the report “Competition Policy for the Digital Era” by the three Special Advisers to the EU Commissioner for Competition, there are significant challenges to balancing the pro- and anticompetitive effects, which cannot be estimated with certainty: *“There will be uncertainty in all directions and making a balanced error cost analysis will require great care and intellectual discipline”*.³

Of course, some degree of forward looking assessment is *sine qua non* to merger review. However, these tests create a risk of significant error-cost – in the adoption of speculative theories of harm that are not based on verifiable and/or calculable evidence. A key aspect in examining the growth potential of relatively young companies in the digital space is that their success trajectory in digital markets is perhaps one of the most difficult to assess with any degree of certainty. As the CMA acknowledged in its response to the Furman Report, the future trajectory of digital markets is difficult to predict. The digital sector is prone to disruptive innovation, which denotes the idea of unanticipated, rapid, and significant changes to businesses, markets, and competition. This complicates rigorous forward-looking assessment of markets.

The share of supply test may provide the CMA with jurisdiction to at least review transactions involving nascent competitors/ potential competitors, such that it can review internal

¹ http://www.learlab.com/wp-content/uploads/2019/06/CMA_past_digital_mergers_GOV.UK_version-1.pdf.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

³ J Crémer, YA de Montjoye, H Schweitzer, *Competition Policy for the Digital Era* (2019) p. 123.

documents to enable it to actually examine concrete evidence regarding plans and intention, rather than speculating regarding related markets into which they might expand or migrate.

(ii) Loss of innovation – eg where the market is characterised by competition in “innovation spaces” or the target has a history of disruptive digital innovation.

The line between actual or perceived potential competition, on the one hand, and innovation, on the other hand, is indistinct. In digital markets, innovation is the key driver of both competition and significant efficiencies. It also facilitates key quality-based competition. Service intermediators, search engines, and online marketplaces have all been credited with making products and services cheaper, more convenient and increasing quality.

The EU Commission has examined possible loss of innovation in the context of mergers in pharmaceutical markets. The Commission considers competition in innovation in both existing and new markets, including products under development and technologies that may either replace existing products or expand or create new demand. For example, in *Novartis/GSK Oncology Business* the Commission did not conduct an overlap analysis. Instead, the theories of harm focused on early stage pipeline products and Novartis’ incentive to maintain two R&D programmes.

While the potential effects of a transaction must be carefully examined, the pharmaceutical sector cases make it clear that it can be difficult to identify development trajectories. It is also important to appreciate that many acquisitions in the digital sector are intended to augment the acquirers existing technology and/or to acquire the services of people with valuable skills. The acquirer might not be acquiring an entity for the service or product that it is offering - the acquirer may see new potential implementations of technology.

Given that there is as of yet little to no evidence of “killer” acquisitions in digital markets, great care would be required in transposing the analytical approach to digital markets. It will also be important to ensure that any such speculative analysis of transactions in digital markets also takes into account the additional reach, resources for development, and access to complementary skills and expertise that enhance their overall efficiency that result from such transactions, and does not simply discourage innovation.

Further, and as briefly noted in response to Question (b)(i) above, a significant amount of innovation in digital markets is disruptive, both with regard to technologies and business models. Such innovation is innately unpredictable, for competition authorities and companies alike, making it extremely difficult to conduct meaningful assessments of innovation in the context of a speculative theory of harm.

(iii) Non-horizontal effects – eg where the combined entity will control an important dataset for competition in upstream/downstream or neighbouring markets.

Competition concerns relating to data have, to date, largely related to data collection and usage in the context of monetisation of multi-sided platforms. Further, existing case law on exclusion, and the circumstances in which it might be appropriate to impose an access obligation, makes it clear that the threshold to establish that accumulation and possession of data is exclusion is high. *Bronner* and *Magill* provide a framework for determining whether it is appropriate to mandate access for competitors to promote allocative efficiency.

Application of the *Magill/Bronner* framework provides guidance as to whether data confers the ability to exclude, which includes but is not limited to the following factors: the replicability (or “uniqueness”) of data; whether consumers multi-home; whether there is a particular type, the same or a comparable set of data; the exclusivity of the data; the degree to which the data is important to compete in a related market; whether data is subject to decreasing returns; and how quickly data becomes outdated. A substantial part of this assessment, as a result, relates to the nature, type and relevance of data in issue (see the response to Question (a)(iv), above).

As these cases make clear, and as noted above, access remedies are potentially useful in circumstances where data is an input. However, in none of the IP access and interoperability cases (including *Microsoft I*) was access mandated between horizontal competitors in relation to inputs used in the primary market in which the parties compete and the data holder is dominant. It also seems unlikely that access to data would not be an appropriate remedy in circumstances involving horizontal competitors.

(c) What other theories of harm might arise where the target is active in a complementary market? For example:

(i) Are there circumstances in which efficiency benefits arising from a merger could be considered to give rise to competition concerns?

One of the main competition concerns currently being raised in the context of such efficiencies relates to network effects and the potential for tipping of digital markets. As set out in response to Question (a)(v), above, network effects require and benefit from scale, however, scale in digital markets is neither inherently nor necessarily anticompetitive.

Whether there are effects resulting from data-related network effects depends on the nature of the data itself. Where the holder of data has market power that enables control over further data collection (with the ability to exclude others from also collecting such data), and where the holder of data has the incentive and ability to anti-competitively exploit it, the acquisition and use of further data might create market power. As a result, where companies engage in leveraging that excludes competitors, there may be cause for review.

However, recent investigations indicate that the existing competition toolkit is capable of addressing such practices in digital markets. That is, where market power in one digital market is leveraged to benefit a service in a related market, the assessment need not depart from the approach ordinarily adopted in abuse of dominance cases.

(ii) To what extent is it important to consider the possibility that a merger could prevent another firm from buying complementary assets and, as a result, be better able to compete?

For a company to acquire certain assets pre-emptively to deny a competitor access to those assets (where the competitor would use the assets to compete more effectively) is essentially a form of asset hoarding (which has been considered in both the pharmaceutical and energy sectors). In the former context, it has involved the purchasing of pipeline products that are “mothballed” to deprive competitors of access to them without the asset being productively used to put a new product on the market. The latter has occurred, for example, where dominant companies inhibit access to energy infrastructure to disadvantage rivals or prevent entry.

Accordingly, there does not appear to be a need for reform of the existing legal framework to address cases of such hoarding in digital markets. The CMA already has the ability to review both transactions leading only to the acquisition of material influence (well below “control”), and the share of supply test enables it to review transactions where the target does not generate material revenue, if the acquirer already has a material market presence.

As a result, the CMA has the tools necessary to consider transactions. However, it remains important that robust and credible theories of harm are formulated, rather than merger parties being required to establish a negative.

However, there may be additional evidential issues in digital markets, given that digital innovation can be deployed in a variety of ways, in different services and markets that were not contemplated by the original developer. Further, examining in a forward-looking assessment whether an innovative business model or technology being acquired would enable another company to better compete is prone to evidentiary and calculation shortcomings, as described in response to Questions (b)(i)-(ii). To examine whether potentially complementary digital assets creates a “data advantage” raises questions regarding the nature and relevance of data, previously set out in response to Question (a)(iv). To reiterate, the mere collection and accumulation of data is not exclusionary. The fact that one entity has such data does not preclude others from collecting the same or fungible data.

In addition, to identify which companies may acquire certain assets and which may not using parameters other than those established by generally applicable competition rules risks a degree of arbitrary regulatory over-intervention that competition authorities have historically avoided.

Finally, it is important to retain sight of the fact that the CMA has Chapter I and II (and, at least currently, Article 101 and 102) powers to review conduct following any transaction would might be anticompetitive.

(d) How should we approach the assessment of non-price parameters of competition in digital markets?

Non-price parameters such as quality and consumer welfare are part and parcel of any competition assessment. Indeed, since they do not internalise the demand-side’s willingness to pay, two-sided markets frequently make price considerations less important for the consumer-side of the market. Instead competition occurs on parameters related to quality. While the lack of a price proxy on one side of a digital market may complicate the accurate assessment of market power, increased focus and competition on quality generate significant consumer benefits.

(e) When determining the counterfactual: (i) Which types of evidence should we take into account and how should these be weighted? (ii) How should we assess: (A) The growth prospects of the target? (B) The availability of other routes for the target to grow (eg by attracting external financing)? (C) The possibility of the target being acquired by an alternative party?

As previously noted, a significant degree of innovation in the digital space is characterised as disruptive innovation, which can relate to both technologies and business models. The development routes and growth prospects of companies are, therefore, generally difficult to predict, which relates to each of the factors outlined in Question (e). It should also be noted that most mergers in the digital space are likely to be competitively benign.

The responses to Questions (b)(i)-(ii) discuss the risks associated with speculative forward-looking assessment of the probability and magnitude of anticompetitive effects associated with digital mergers. The same or similar considerations would also apply in examining the counterfactual and potential growth and third-party acquisition prospects. If such an assessment were to be conducted, the tools used in forward-looking assessments should also furnish insights regarding efficiencies and the potential counterfactual. This essentially requires a forward-looking assessment of probabilities and magnitudes. In other words, to ensure a balanced competition assessment of the potential effects of digital mergers, any approach that gives greater weight to potential anticompetitive effects must also accord commensurate weight to the potential procompetitive effects.

It is also important to recall that a significant number of start-ups and the innovations they develop are developed taking into account possible eventual sale to larger companies that can add scale and expertise to the product or service. As a result, a merger review process may stifle innovation by ruling out important "exit strategies".

(f) What evidential weight should be attached to:

(i) Internal documents indicating that the purpose of the transaction is to eliminate a competitive threat?

Even in the context of traditional bricks-and-mortar markets, the assessment of internal documents requires some circumspection. Such documents will often use concepts and terms that are competition terms of art in a non-technical sense. There also tends to be a certain stakeholder hazard: authors of such documents tend to have an incentive to formulate documents in a manner that promotes their ideas, initiatives, and/or contributions. As a result, documents may exaggerate and overstate the likelihood of success *etc.*

Further, as previously set out in responses to Questions (b)(i)-(ii) and (e), as it can be difficult to predict to a meaningful degree of reliability digital markets.

(ii) A high transaction value relative to the market value or turnover of the target?

Various recent studies examine the evidential weight of the valuation of transactions. The Lear Report, for example, suggests that high transaction value may be an indicator for competition authorities of transactions that require more detailed analysis. However, such a test may enable the CMA to ensure that it has the opportunity to review a larger number of digital mergers. That said, in 2018, the value of transaction test in Germany only led to the notification of 18 transactions (of which seven were not reviewed by the FCO). Since the CMA already has the share of supply test, experience suggests that it may already have the jurisdictional tools to review many of the handful of transactions that were reviewed by the FCO applying the new rules.

Turning to the substance. Having set out above why a balance of harms approach may lead to errors and be difficult to administer, it is also important to note that there is also no direct correlation between the value of a transaction and the potential magnitude of competitive effects. A target may be of value and/or acquired for a variety of reasons that are competitively benign, if not irrelevant altogether. More important, and as set out in the Furman Report, a high transaction value may indicate mergers where it is especially important to understand the rationale for the transaction. That is, rather than assuming a certain magnitude of competitive effects, the value of the transaction ought merely to serve as an indicator that it merits further analysis to better understand its rationale.

(g) Are there particular features of digital mergers that would be relevant to our assessment of efficiencies and relevant customer benefits?

Please see the response to Question (c)(e) above.
